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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WINSTON HALL WORTHINGTON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Is petitioner entitled to an evidentiary hearing on his 28 U.S.C. § 2255 claim in light of *Machibroda v. United States,* 368 U.S. 487 (1962), *U.S. v. Cronic,* ____ U.S. ____, 35 Cr.L. 3061 (1984) and *Strickland v. Washington,* ____ U.S. ____, 35 Cr.L. 3066 (1984) when he alleges that he was denied the effective assitance of counsel mandated by the Sixth Amendment because:

(1) Trial counsel, John Farese, failed to timely file a MOTION TO SUPPRESS specifically attacking the search warrant and its supporting affidavit as violating the provisions of the Fourth Amendment of the United States Constitution thereby denying petitioner appellate review of the merits of the search and ensuing seizure on direct appeal, the product of which substantially if not entirely established the government's case;

(2) The Court of Appeals for the Sixth Circuit held, on direct appeal, that counsel, John Farese, had failed to comply with Rules 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure thus waiving any MOTION TO SUPPRESS and obviating a decision on the merits;

(3) Trial counsel, John Farese, was motivated by his personal pecuniary goals rather than the best interests of the petitioner;

(4) Trial counsel, John Farese, failed to make a diligent and reasonable investigation into the allegations of the indictment having had nearly three years prior to trial to do so and;

(5) Trial counsel, John Farese, persuaded the petitioner to waive venue with respect to the Arkansas counts of the indictment without advising petitioner of the consequences and alternatives.

II. In ruling on petitioner's § 2255 claim is the Court of Appeals permitted to address the merits of the search warrant and affidavit in light of *Stone v. Powell,* 428 U.S. 465 (1976) and *Davis v. U.S.,* 411 U.S. 233 (1973) after specifically finding on direct appeal, *U.S. v. Worthington,* 698 F.2d 820 (6th Cir. 1983), that trial counsel had waived the issue; and can trial counsel's apparent ignorance of the time provisions of Rule 12 be properly characterized as "trial strategy."

III. Does a search warrant satisfy the particularity requirements of the Fourth Amendment when it authorizes government agents to seize:

> All patient treatment records and charge slips; all patient ledger cards; the general ledger(s) containing the record payments made to employees, laboratories, etc.; all x-ray films; and other fruits, instrumentalities and evidence of crime at this time unknown, covering the period from July 1973 to the present.

Can the process of severance validate such a warrant?

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No.

IN THE

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OCTOBER TERM, 1983

WINSTON HALL WORTHINGTON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 18, 1984 and March 5, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 726 F.2d 1089 and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 18, 1984 and a timely PETITION FOR REHEARING EN BANC was denied on March 5, 1984. This PETITION FOR CERTIORARI was filed within 90 days of March 5, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable statutory provision involved is 28 U.S.C. § 2255 which provides in part as follows:

> A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States. . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereon.

Rule 12 of the Federal Rules of Criminal Procedure provides in part the following:

> 12(b) **Pre-trial Motions**. . . The following must be raised prior to trial:
>
> (3) Motions to supress evidence;
>
> * * * * *
>
> (f) **Effect of Failure to Raise Defenses or Objections.** Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment.

> In all criminal prosecutions the accused shall. . . have the assistance of counsel for his defense.

Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

A. Pre-Indictment Proceedings.

Petitioner is a physician who entered the private practice of medicine in late December of 1973 when he opened an office in Caraway, Arkansas.

Some time in early 1974 petitioner was enrolled as a health care provider in the Medicare/Medicaid programs. Later, petitioner established a medical practice in Memphis, Tennessee and likewise was enrolled as a health care provider in the Medicare/Medicaid programs.

In October of 1977 United States Postal Inspectors executed a search warrant of petitioner's clinic located in Memphis, Tennessee and seized the following:

1. 7,822 patient records.
2. All business records.
3. All x-rays.
4. All ledgers and general journals.

5. All personal effects of the defendant.

6. All laboratory books.

7. All charge slips.

8. All documents relating to petitioner's medical practice however described and wherever located in the office. The warrant appears in the appendix.

The records filled 79 boxes and were transported by two mail trucks to the district court where they were stored in the Grnad Jury room. It took six government agents nearly four weeks to inventory the records and it took an additional four months in which to computerize the information obtained.

Over one year later on November 17, 1978 petitioner was charged in a 300 count indictment alleging that he had submitted false claims for medical services rendered for payment under the Medicare/Medicaid programs.

B. The Trial.

The indictment covered the period of time from January 1974 through December of 1976. One hundred thirty-seven counts of the indictment related to petitioner's medical practice in Caraway, Arkansas for the period of time January 1974 through December of 1974. One hundred sixty-two counts of the indictment related petitioner's medical practice in the State of Tennessee from late 1974 until late 1976. The remaining count, which was ultimately dismissed by the district court during trial, charged a RICO violation.

Prior to the return of the indictment, chief defense counsel, John Farese, of Ashland, Mississippi instructed petitioner to sign a document waiving venue with respect to any claims arising out of his Arkansas medical practice. Petitioner was not advised of the consequences of executing the document nor of any other reasonable alternatives to that decision. See, MOTION TO VACATE.

Prior to trial, defense counsel filed a number of preliminary motions. None of the motions specifically questioned the validity of the search warrant or supporting the affidavit.

The closest trial counsel ever came to even addressing the issue was in a motion filed on December 21, 1978 entitled "Motion to Suppress Evidence and to Dismiss or Quash the Indictment". Parts 3(d) and (e) of the Motion stated:

> (d) The indictment was obtained solely through the use of illegal, incorrect and prejudicial tactics on the part of the government.
>
> (e) The indictment was obtained and is supported only by evidence obtained illegally and is the direct result of impermissible conduct on the part of the government officials investigating the case.

On August 10, 1979 the district court overruled that motion as well as others pending. *U.S. v. Worthington,* 698 F.2d 820, 822-23 (6th Cir. 1983).

During this time Farese had associated local counsel to assist him in the preparation and trial of this case. However, just days before trial was scheduled on April 7, 1980, Farese retained yet another local attorney, J. Fred Friedman, to help him try the case.

It was Friedman's entry into the case which then gave rise to a second "Motion to Suppress Evidence" which was filed 45 minutes before the trial was scheduled to start. *U.S. v. Worthington, supra* at 823.

Unfortunately Friedman did not address the warrant's lack of particularity.

A mistrial occurred and a second trial started on April 9, 1980. On the 20th day of the second trial, May 19, 1980, trial counsel attempted to renew their previous Motions to Suppress.

The renewed Motion alleged, for the first time, that the search warrant was overbroad. The district court overruled the Motion finding that it was not filed in accordance with the provisions of Rule 12(f). *U.S. v. Worthington, supra* at 823.

During the course of the trial the district court made a number of observations about the defendant's retained trial counsel. On one occasion Mr. Friedman was characterized as childish. Both counsel were chastised for asking to see documents before they were introduced into evidence, they were the subject of much sarcasm, they were accused of attempting to confuse the issues, Friedman was told that he was talking "Chinese"; the court advised Mr. Friedman to "open" his eyes because he always closed them when he was lying; John Farese was criticized for his "tactics and lack of ability".

On other occasions there was repeated conflict between the court and counsel with charges and denials by each. On one occasion the court inquired why objection to certain evidence had not been made and Mr. Friedman responded by stating that the failure to object was due to the past rulings of the court and that objection would serve no useful purpose.

The court advised defense counsel that it was tired of "listening to junk after seven weeks of trial" and that the defense was dreaming up silly things. The district court again ridiculed Mr. Farese.

On yet other occasions the district court accused Mr. Friedman of "fantasizing and making things up and not being honest with the court", admitted that Mr. Farese had good reason to believe that the court "is not on his side" and that it (the court) wishes it had the nerve to declare a mistrial "just to see the expression on Mr. Friedman's face."

At the trial's conclusion the defendants moved for a mistrial alleging that the district court's attitude had been hostile and belligerent. Counsel argued the defendant was not getting a fair

trial nor being accorded the effective assistance of counsel; the court was biased in favor of the government and defense counsel had been maligned and whipshod into not voicing objections, bullied, bandied and forced into untenable, unlivable conditions; and they were being picked upon and advised by the court that they did not know how to ask questions and characterizing their objections as ridiculous and frivolous.

The court responded by advising Mr. Farese:

> Now furthermore Mr. Farese you sit down. I have had a hard time getting a fair trial. And Mr. Farese, if Dr. Worthington is found "not guilty" you go home and get on your knees and ask forgiveness because your side didn't play by the rules.
>
> I didn't find this out until last week, but you bragged about how well you are thought of in Holly Springs, Mississippi and that is not true.

Petitioner was ultimately convicted on 82 counts of fraud. Sixty-seven of the counts related to his Arkansas practice and 15 related to his Tennessee practice. The government dismissed 101 counts, the district court directed a verdict on the RICO count, and petitioner was acquitted on 116 counts.

In a subsequent civil suit brought by the government it was established, with respect to the counts upon which petitioner had been convicted, that the Medicare/Medicaid programs had sustained actual total damages of $3,074.00 out of a total of $474,511.00 worth of billings for the years involved.

Of this amount $2,827.00 related to overcharges occurring in Arkansas involving approximately $43,000.00 worth of submitted bills and $247.00 of overcharges in Tennessee.

The maximum potential of damages had petitioner been convicted of all charges would have been approximately $7,700.00.

At no time during the course of the trial did defense counsel ever attempt to demonstrate that the errors in billings were due to honest mistakes resulting from petitioner's inexperience as opposed to being motivated by fraud.

Petitioner was sentenced to two years' confinement and fined a total of $40,000.00. The fine was later reduced to $20,000.00. Petitioner retained new counsel for the purposes of appeal and his convictions were duly appealed to the Court of Appeals for the Sixth Circuit. On January 25, 1983 his conviction was affirmed. *United States v. Worthington,* 698 F.2d 820 (6th Cir. 1983).

Petitioner then instituted proceedings to vacate his sentence and conviction pursuant to 28 U.S.C. § 2255. On March 17, 1983 the district court dismissed the petition without requiring an evidentiary hearing. The district court opinion appears in the appendix.

Petitioner again appealed to the Court of Appeals for the Sixth Circuit. On January 18, 1984 the court affirmed the dismissal of his Motion to Vacate and denied his suggestion for rehearing and rehearing en banc on March 5, 1984. *United States v. Worthington,* 726 F.2d 1089 (6th Cir. 1984).

REASONS FOR GRANTING THE WRIT

A. It Is Fundamentally Unfair To Deny Petitioner An Evidentiary Hearing Under The Facts Here.

Under the statute, 28 U.S.C. § 2255, and this Court's holding in *Machiboda v. United States,* 368 U.S. 487 (1962) petitioner is entitled to an opportunity to make out his claim for relief.

Petitioner has alleged that John Farese failed to file a timely Motion to Suppress addressing the lack of particularity of the search warrant and the failure of the affidavit to establish credibility and reliability on the part of the unnamed informants. Petitioner further alleged that Farese failed to diligently and reasonably conduct an investigation of the allegations of the indictment having had nearly three years to do so, that he was paid exorbitant sums of money for attorney's fees and management of the litigation but was motivated more by a "personal pecuniary goal than the best interests of defendant;" and that he induced the petitioner into waiving jurisdictional claims with respect to offenses alleged to have occurred in Arkansas in early 1974 without properly advising petitioner of the consequences of such a waiver or the reasonable alternatives thereto.

While it is true that the district court had an opportunity to evaluate the performance of trial counsel and that is a factor in ruling on an effective assistance of counsel claim, it is equally true that the district court's observations may be overcome by proof of what trial counsel *actually did prior to trial.*

For example, literally days before the trial was scheduled, Farese attempted to have the matter reset. His motion for continuance was denied. Yet, just days before an eight week trial was to begin, Farese saw the need to hire J. Fred Friedman to participate in the actual management of the litigation. The record clearly establishes that Friedman undertook a major portion of the actual day-to-day defense of defendant.

The most important issue to be resolved is whether or not Farese pursued a course of conduct more suited to his personal pecuniary goals than one properly conceived for the benefit of his client.

Moreover, a claim alleging ineffective assistance of counsel is not one that can be easily determined by simple reference to the record before the trial court. *Thor v. United States,* 574 F.2d 215 (5th Cir. 1978); *United States v. Yelardy,* 567 F.2d 863, 866 (dissenting opinion) (6th Cir. 1978); and *United States v. Hearst,* 638 F.2d 1190 (9th Cir. 1980).

In the Sixth Circuit the measure of the Sixth Amendment's guarantee of effective assistance of counsel is established in *Beasley v. United States,* 491 F.2d 687, 696 (6th Cir. 1974). The *Beasley* standard or one remarkably similar to it is now followed in all of the federal circuits including the Second Circuit which recently abandoned its "farce and mockery" test. *Trapnell v. United States,* 725 F.2d 149 (2d Cir. 1983).

Under *Beasley* the assistance of counsel required by the Sixth Amendment is:

> Counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in criminal law and *must conscientiously protect his client's interests undeflected by conflicting considerations. . . . Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.* 491 F.2d at 696.

The district court's conclusion that petitioner received the effective assistance of counsel, in light of the court's view of their representation during the trial itself, is untenable in light of the record taken as a whole.

In dismissing the petition the district court held that its remarks to trial counsel "were admonitions to the defense attorneys to prevent those attorneys from violating the procedures necessary for conducting a fair trial. The defense attorneys pursued a deliberate pattern of delaying the trial and of trying to obtain an advantage for the defendant by unfair tactics."

The district court did note that the Court of Appeals held that its "comments and castigations of counsel would have been better left unsaid" but defense counsel repeatedly sought to elicit irrelevant testimony, or that they frequently disregarded earlier court rulings." *U.S. v. Worthington,* 698 F.2d at 826-827.

The Sixth Amendment's guarantee of effective assistance of counsel is a right which is inexorably intertwined with the fact-finding process. Effective counsel can make the difference between a finding of guilt or innocence.

A lawyer who establishes his pocketbook as his first priority does not give effective assistance of counsel to his client as mandated by the Sixth Amendment.

Moreover, a lawyer who operates in total ignorance of the time provisions of Rule 12, or those set by the district court, cannot possibly be found to be making a tactical decision or engaging in trial strategy. *Worthington v. United States,* 726 F.2d 1089, 1092 (6th Cir. 1984). It is clear that when Farese advised petitioner, in reponse to his request that a motion be filed attacking the warrant's overbreath, that the "time was not yet right" that Farese was either not competent in the ordinary sense of the word to try a federal criminal case or had some other goal in mind. The failure was prejudice of the worse kind. *U.S. v. Cronic,* ____ U.S. ____, 35 Cr.L. 3061 (1984); *Strickland v. Washington,* ____ U.S. ____, 35 Cr.L. 3066 (1984).

B. **In A Proceeding Under 28 U.S.C. § 2255 Alleging Ineffective Assistance Of Counsel, An Appellate Court Is Not Free To Review The Merits Of A Motion To Suppress Previously Held On Direct Appeal To Be Waived.**

The issue is not whether or not the motion to suppress would have been granted if filed but whether or not trial counsel *should have filed the motion in the first instance.*

The merits of the search were not reviewed on direct appeal because the Court of Appeals found that trial counsel had not timely filed the motion in accordance with Rule 12(f). *United States v. Worthington,* 698 F.2d at 824. Having found that the motion was waived, the Court of Appeals should not be permitted to then address the merits of the warrant in a collateral attack in a § 2255 proceeding.

This Court has held specifically in *Davis v. United States,* 411 U.S. 233 (1973) that:

> The necessary effect of the congressional adoption of Rule 12(b)(2)[12(f)] is to provide that a claim once waived pursuant to that rule may not later be resurrected either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which that rule requires. 411 U.S. at 242.

And if not directly, at least indirectly, the same result is mandated by this Court's holding in *Stone v. Powell,* 428 U.S. 465 (1976). *Cf. Kaufman v. United States,* 394 U.S. 217 (1969).

In order to demonstrate cause, the Court of Appeals and the district court must have found that Farese's motive in not filing the motion was to avoid an early resolution of the criminal proceeding in order to extract more fees from petitioner. And if the district court and Court of Appeals were not willing to make that assessment in the absence of an evideniary hearing, then the only cause that could be demonstrated would be that Farese was in fact "incompetent." Either conclusion would justify a finding of ineffective assistance of counsel warranting relief.

The effect of the Court of Appeals' decision is to permit and encourage trial counsel to waive rights which must be asserted prior to trial so that they can be raised in an after-the-fact fashion in a § 2255 proceeding by other counsel.

It is submitted that the scope of the inquiry in § 2255 matters is much narrower than the Court of Appeals finds necessary in this case. That issue has not been specifically addressed by this Court and should be in light of the record here an in view of the potential for abuse in the future.

C. Assuming, Arguendo, That The Court Of Appeals Was Free To Review The Warrant In A § 2255 Proceeding, Its Conclusion That The Warrant Was Valid Is Incompatible With This Court's Decision In Andresen v. Maryland, 427 U.S. 463 (1976) And Marron v. United States, 275 U.S. 192 (1927).

The Fourth Amendment requires that no warrant issue but upon probable cause "and particularly describing the place to be searched and the . . . things to be seized." Thus at least two elements must coalesce before a search will pass consitutional muster.

First the supporting affidavit must demonstrate probable cause to support the issuance of the warrant. Second, the warrant must describe with particularity the items to be seized.

Obviously a specifically drawn warrant describing with minute particularity the items to be seized but issued without probable cause would violate the Fourth Amendment. Likewise, a general or vague warrant which does not describe the items to be seized with the requisite particularity is a nullity even though the affidavit supplies overwhelming probable cause. In either case, the searches violate the Fourth Amendment.

Assuming, arguendo, that the affidavit in this case was sufficient for Fourth Amendment purposes, it is clear that the warrant failed to satisfy the particularity requirements of the Fourth Amendment.

In addressing the merits of the warrant, the Court of Appeals seems to be deciding that since the affidavit would have authorized the seizure of Medicare and Medicaid records, and the warrant authorized the seizure of *all* records, then the search is valid because the Medicare and Medicaid records are obviously encompassed within the phrase "all records." *Worthington v. United States,* 726 F.2d 1089, 1092 (6th Cir. 1984).

The Court of Appeals did find that the warrant in this case is overbroad but that its overbreath did not convert it into a general warrant. *Id.* at 1094.

However, the concurring opinion concedes that the warrant language was overbroad and that the "weight of current authority would require the Medicare/Medicaid records to be suppressed; for although the government had probable cause to seize those records, they were seized under invalid warrant language." *Id.* at 1095-96.

The court further held that though all of the petitioner's records were seized, *id.* at 1095, the non-Medicare and non-Medicaid records were not admitted into evidence and thus petitioner suffered no prejudice. *Id.* at 1095. However, that conclusion is not borne out by the record before the court either on direct appeal or on the appeal of the denial of the evidentiary hearing in the § 2255 proceeding. It was simply a statement contained in a footnote to the government's brief on direct appeal.

The court is correct in saying the overwhelming weight of the authority would require suppression of the evidence in this case.

Suppression was ordered in the following cases where identical warrant language was employed. *United States v. Christine,* 687 F.2d 749, 752 (3rd Cir. 1982); *United States v. Cardwell,* 680 F.2d 75 (9th Cir. 1982); *United States v. Jacob,* 657 F.2d 49 (4th Cir. 1981; *United States v. Cook,* 657 F.2d 730 (5th Cir. 1981); *United States v. Drebin,* 557 F.2d 1316 (9th Cir. 1978); *United States v. Klein,* 565 F.2d 183 (1st Cir. 1977); *United States v. Burch,* 432 F. Supp. 961 affd. 577 F.2d 729 (3rd

Cir. 1978); *United States v. Abrams,* 615 F.2d 541 (1st Cir. 1980); *Montella Records of Puerto Rico, Inc. v. Morales,* 575 F.2d 324 (1st Cir. 1978); *In Re: Lafayette Academy,* 610 F.2d 1 (1st Cir. 1979); *United States v. Roche,* 614 F.2d 6 (1st Cir. 1980); *United States v. Defalco,* 509 F. Supp. 127 (S.D. Fla. 1981); and *United States v. Townsend,* 394 F. Supp. 736 (E.D. Mich. 1975).

The effect of the court's decision is to encourage overbreath rather than the particularity mandated by the Fourth Amendment. Obviously the broader the language the more likely it is to include those items which might be specifically sought. But the Fourth Amendment does not permit the use of expansive language to justify the seizure of items which should be identified with specificity where probable cause exists.

To encourage this draftsmanship would be tantamount to returning to the general writs of assistance long condemned by this court. *Marron v. United States,* 275 U.S. 192 (1927); *Andresen v. Maryland,* 427 U.S. 463, 480 (1976).

Unlike the warrant in *Andresen, supra* which was found to be the model of particularity, *id.* at 479, the warrant in this case employes language which cannot be pared down to justify the seizure of any records. The warrant does not specify a particular crime to which the evidence sought bears some relationship. Instead, government agents are told to take all records without any regard to their relevancy.

Simply because the agents did not have to determine what constituted a record did not render the search nondiscriminatory. To the contrary, the warrant invited a fishing expedition and the wholesale rummaging through the personal effects of the petitioner. *Andresen, supra* at 480, 481 n.11.

If the process of redaction or severance is to be employed it may only be employed in those cases where the warrant's language would permit the seizure of a particularly described

item after the offending or overbroad language is removed. When the offending language is removed in the warrant here, the only thing that remains is the pre-printed form itself.

CONCLUSION

Based upon the foregoing reasons petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit and that this matter be reversed and remanded for further proceedings consistent with this court's judgment.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 78-20181

United States of America,

vs.

Winston Hall Worthington,
Defendant.

MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255

(Filed Feb. 7, 1983)

Defendant respectfully shows to the Court:

1. Judgment was entered against him in the United States District Court for the Western District of Tennessee, Western Division.

2. The date of the judgment of conviction was September 26, 1980.

3. The length of the sentence was two years on each of eighty-two counts to run concurrently, making a total period of confinement of two years. In addition, defendant was ordered to pay a fine of $40,000.00.

4. The offenses involved violations of 18 U.S.C. §287, 18 U.S.C. §1341, and 18 U.S.C. §1001.

5. Defendant entered a plea of not guilty.

6. Defendant received a jury trial.

7. Defendant testified at the trial.

8. Defendant appealed his judgment of conviction to the United States Court of Appeals for the Sixth Circuit. The judgment was affirmed January 25, 1983.

9. On February 2, 1983, Defendant filed a Motion to Reduce Sentence in the United States District Court for the Western District of Tennessee, Western Division, alleging that in a separate civil action brought by the United States, he entered a settlement waiving his right to approximately $75,000.00 in undisputed benefits which had been withheld by the government and paid an additional $175,000.00 for a total of $250,000.00 and since May, 1981, he had voluntarily ceased his medical practice pending the ultimate disposition of the criminal case. In the interim, he has not had any substantial source of income. These factors were not known to the Court at the time of sentencing. The motion is pending at this time.

10. The grounds upon which this motion is based is that Defendant was denied the effective assistance of counsel. His reasons are as follows:

(a) Trial counsel, John Farese, failed to timely file a motion to suppress evidence, specifically attacking the search warrant and its supporting affidavit as being in violation of Defendant's rights under the Fourth Amendment to the Constitution of the United States, thereby denying Defendant appellate review of the merits of the search and seizure, the product of which substantially supported the government's case. The Court of Appeals held that counsel had failed to comply with Rule 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure and thus, the motion to suppress was waived. A copy of the Court's opinion is attached as an exhibit.

(b) Trial counsel, John Farese, failed to diligently and reasonably conduct an investigation of the allegations of the indictment, having had nearly three years to do so.

(c) Trial counsel, John Farese, was paid exorbitant sums of money for attorney's fees, expenses and management of litiga-

tion and was motivated more by a personal pecuniary goal than the best interests of Defendant.

11. The search warrant was executed on or about October 25, 1977, as the result of which 7,822 patient records, files, x-rays, ledgers and all other personal papers of Petitioner were seized. The indictment was returned November 17, 1978. On December 21, 1978, Mr. Farese filed a Motion To Suppress Evidence And To Dismiss or Quash The Indictment. It alleged only that "the indictment was obtained and is supported only by evidence obtained illegally and as the direct result of impermissible conduct on the part of government officials investigating the case." The government's response was that those allegations were too insubstantial to be answered specifically and accordingly were generally denied. On August 10, 1979, the motion was overruled. Mr. Farese never filed a written motion attacking either the search warrant or its supporting affidavit on well recognized grounds.

12. Shortly before the trial began additional counsel, Jay Fred Friedman, was hired by John Farese. Mr. Friedman filed a motion to suppress on April 7, 1980. It was overruled.

On May 19, 1980, the twentieth day of the trial, forty-one calendar days after the trial began, and after the government had rested and Defendant was well into his proof, a motion to renew the motion to suppress of April 7, 1980 was filed.

For the first time, counsel argued that the warrant was an overbroad the general warrant. This Court denied the May 19, 1980 motion on the grounds that it was a new motion alleging new grounds and was not timely filed. This holding was affirmed on appeal.

13. In the course of Defendant's trial, this Court criticized Mr. Farese repeatedly for his tactics, lack of ability and failure to object timely to certain evidence, stated to Mr. Farese that the Court was having a hard time getting a fair trial; that if Defendant was found not guilty, counsel should get on his knees

and beg forgiveness for not playing by the rules and that the Court had checked on the representation of Mr. Farese that he was well thought of in Holly Springs, Mississippi and found that not to be true.

14. The Court inferred that Mr. Farese did not know what he was talking about and let the jury know that the Court thought that Mr. Farese was not doing the job he was supposed to do.

15. Defendant avers that he was deprived of a substantial defense by the ineffectiveness and incompetence of his counsel, John Farese. He further avers that Mr. Farese did not perform at least as well as a lawyer with ordinary training and skill in the criminal law and did not conscientiously protect defendant's interests but instead protected his own.

16. Defendant avers that Mr. Farese never conducted a thorough investigation of the issues involved; that on many occasions he suggested to Mr. Farese a course to follow including tracing leads that would have been to his benefit and on numerous occasions suggested that a motion to suppress be filed attacking the warrant as being general and overbroad, all of which were ignored.

17. Defendant paid to Mr. Farese and other trial counsel, for attorneys fees and related expenses, about $375,000.00 exclusive of expenses and costs of appeal.

18. there is no petition or appeal now pending attacking the judgment in this case other than the motion to reduce sentence.

19. There was no preliminary hearing in this case, but at arraignment and plea, defendant was represented by John Farese. At trial, he was represented by John Farese, Jay Fred Friedman and Cleveland Drennon. At sentencing, he was represented by the same lawyers. On appeal, he was represented by Hal Gerber and Ronald D. Krelstein and is represented by them in these post-conviction proceedings.

20. Defendant has no future sentence to serve after completing the sentence imposed by the judgment under attack.

WHEREFORE, DEFENDANT PRAYS, that:

(1) The Court require the United States to respond to this motion;

(2) Defendant be granted an evidentiary hearing;

(3) At the conclusion of the hearing, the judgment be vacated and defendant granted a new trial,

(4) Defendant be permitted to remain free on his present bond pending disposition of this motion, and

(5) Defendant be granted any other relief to which he may be entitled to receive.

Respectfully submitted,

GERBER, GERBER & AGEE
3121, 100 North Main Building
Memphis, Tennessee 38103

Attorneys for Petitioner

By: /s/ HAL GERBER

By: /s/ RONALD D. KRELSTEIN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 78-20181

United States of America,
Plaintiff,

vs.

Winston Hall Worthington,
Defendant.

AMENDED PETITION FOR RELIEF PURSUANT TO 28 U.S.C. §2255

(Filed Mar. 8, 1983)

Comes now the defendant-petitioner, Winston Hall Worthington, and amends his Petition for Relief in the following respects:

1. Petitioner would further show that the search warrant and affidavit copies of which are attached as exhibits hereto, and ensuing search and seizure were all unlawful and in violation of petitioner's rights under the Fourth Amendment of the United States Constitution for the following reasons:

A. The warrant is general, overbroad, and fails to meet the particularity requirements of the Fourth Amendment;

B. The affidavit in support of the warrant is insufficient because there is no showing of reliability or credibility of those confidential sources referred to by the affidavit;

C. Government agents executing the search warrant turned the search into a general search and seizure because of their excessiveness in executing the warrant resulting in the seizure of

over 7,800 items including personal and private papers of defendant-petitioner which were wholly unrelated to any alleged offense, and

D. The search was conducted with unnecessary severity.

E. The affidavit contains false and incorrect statements which were included either knowlingly, intentionally or with a reckless disregard for the truth. Such statements were material to the finding of probable cause.

2. Petitioner further alleges that as a result of advice of his chief trial counsel, John Farese, he was induced to waive venue for those offenses of the indictment alleged to have occurred in the State of Arkansas. Petitioner charges that Farese did not advise him that he was executing such a waiver, the alternatives available, or the consequences involved.

Respectfully submitted,

GERBER, GERBER & AGEE
3121, 100 North Main Building
Memphis, Tennessee 38103
(901) 523-0019

/s/ RONALD D. KRELSTEIN

STATE OF TENNESSEE)

COUNTY OF SHELBY)

WINSTON HALL WORTHINGTON, being first duly sworn deposes and says that he has read the contents of the foregoing Amendment to his Petition for Relief pursuant to 18 U.S.C. §2255 and states that the contents are true and correct to the best of his knowledge, information and belief.

/s/ Winston Hall Worthington

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE

Docket No. 77-104M

Case No.

United States of America

vs.

Dr. Winston Hall Worthington

SEARCH WARRANT

To Any Postal Inspector of the United States Postal Service Affidavit(s) having been made before me by Harry W. Kinsella, Special Agent of Investigation, Department of Health, Education & Welfare.

that he has reason to believe that { on the premises known as}

1029 Whitney Avenue, Memphis, Tennessee, being further described as the medical office of Dr. Winston Hall Worthington,

in the Western District of Tennessee there is now being concealed certain property, namely: all patient treatment records and charge slips; all patient ledger cards; the general ledger(s) containing the record of payments made to employees, laboratories, etc.; all x-ray films; and other fruits, instrumentalities and evidence of crime at this time unknown, covering the period from July 1973 to the present,

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of three days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search

{in the daytime (6:00 a.m. to 10:00 p.m.)} and if the property be found {at any time in the day or night*}

there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Aaron Brown, Jr. as required by law.

Dated this 26th day of October, 1977

Aaron Brown, Jr.
Federal Magistrate

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* The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority by appropriate provision in the warrant and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 78-20181

United States of America,

vs.

Winston Hall Worthington,
Defendant.

RULING ON MOTION TO VACATE SENTENCE PURSUANT TO 28 USC §2255

(Filed Mar. 17, 1983)

On November 17, 1978, the defendant, Winston Hall Worthington, was indicted in a 300-count indictment which charged ten violations of four different criminal statutes, all based upon his allegedly filing false claims under Medicare and Medicaid statutes and regulations for medical services not rendered by him. At the end of the longest trial ever conducted in this district, the jury found him guilty on 82 counts and not guilty on 116 counts. The government had earlier dismissed 101 counts and the Court had dismissed on count, which charged a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).

An appeal was perfected and on January 25, 1983, the Court of Appeals affirmed the conviction, ____ F.2d ____ (No. 80-5354). That conviction was issued as a mandate on February 17, 1983. On February 7, 1983, post-conviction counsel filed the instant Motion to Vacate the Sentence Pursuant to 28 USC §2255. The Motion was addressed to a single ground, the denial of the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of America. The reasons stated in numbered paragraph 10 of the Motion are as follows:

(a) Trial counsel, John Farese, failed to timely file a motion to suppress evidence, specifically attacking the search warrant and its supporting affidavit as being in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States, thereby denying defendant appellate review of the merits of the search and seizure, the product of which substantially supported the government's case. The Court of Appeals held that counsel had failed to comply with Rule 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure and thus, the motion to suppress was waived.

(b) Trial counsel, John Farese, failed to diligently and reasonably conduct an investigation of the allegations of the indictment, having had nearly three years to do so.

(c) Trial counsel, John Farese, was paid exorbitant sums of money for attorney's fees, expenses and management of litigation and was motivated more by personal pecuniary goal than the best interests of defendant.

Post-conviction counsel also filed, on February 7, 1983, a Motion for Reduction of Sentence which sought to have the Court reduce or modify the sentence with respect to the period of confinement and the $40,000, but all allegations of the motion were addressed to the defendant's financial condition, particularly post conviction.

On March 4, 1983, the office of the undersigned was notified telephonically that the post-conviction attorneys of the defendant and the Assistant United States Attorney assigned to the case were on their way to the Court's chambers. Immediately thereafter, two attorneys for the defendant and the Assistant United States Attorney appeared in the Court's chambers. No request was made for a court reporter and because the Court did not know the purpose of the visit, no court reporter was summoned. The visit was prompted by a telephone call from a deputy marshall to Attorney Gerber, one of the post-conviction attorneys for the defendant, telling Attorney Gerber that the

ruling of the Court of Appeals affirming the conviction of the defendant had been issued as a mandate and that the defendant was required to report to the Marshal for transfer to Leavenworth Camp to serve the sentence.

Attorneys Gerber and Krelstein requested that Dr. Worthington not be required to report to serve his sentence instanter. The Court agreed because the Court felt that the presence of Dr. Worthington would be necessary to consider his application for a modification of sentence in the matter of his fine, but not his sentence of incarceration.

At that session, counsel for the Defendant Worthington announced that they considered that they were entitled to an evidentiary hearing on the Motion to Vacate and that an amendment to the Motion was in process. They made an appeal to the Court to have their client remain out of custody until the hearing on the Motion to Vacate was conducted. Counsel indicated that the preparation for the hearing would be protracted because counsel planned to ask this Court to approve a program of discovery that would be extensive. Counsel also indicated that the discovery would include the alleged incompetent attorney, John Farese, one of the former attorneys for the defendant. Counsel also stated that they intended to assert that the law firm of Farris, Hancock, Gilman, Branan, Lanier and Hellen was also incompetent. In this regard, it should be noted that Cleve Drennon of the Farris firm was one of the three attorneys from separate firms who represented the defendant through out the entire criminal trial. Attorney Krelstein also indicated that he would offer 400 attorneys to testify that Dr. Worthington was right when he demanded that Attorney Farese file a Motion to Suppress in accordance with the one considered by the Court of Appeals.[1]

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[1] This Court does not believe that counsel was being literal when he stated that 400 lawyers would disagree with the strategy of Lawyer Farese. In any event, this Court had no intention of hearing 400 lawyers testify to the same thing. Rule 403, Rules of Evidence.

On March 8, 1983, counsel for the defendant filed an Amended Petition for Relief Pursuant to 28 USC §2255. The Amended Motion asserts two numbered grounds. The first is limited to an elaboration of the Motion to Suppress issues asserted in the original Motion to Vacate and the Court of Appeals. The second ground of the Amended Motion is based upon an allegation that the defendant was induced by John Farese to waive venue for those offenses of the indictment alleged to have occurred in Arkansas. Defendant charges that "Farese" did not advise him that he was executing such a waiver, the alternatives or the consequences.

28 U.S.C. §2255 provides in part as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

This Court concludes that the "motion and the files and records of the case conclusively show that the [about to be] prisoner is entitled to no relief." The reasons for this conclusion are set forth below.

The leading case in this circuit and the one relied upon by the movant/defendant is *Beasley v. United States,* 491 F.2d 687

(C.A. 6 1974). That case notes that the clause of the Sixth Amendment to the Constitution which guarantees "assistance of counsel for his defence" means effective assistance of counsel. This means counsel who is reasonably likely to render and does render reasonably effective assistance. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest undeflected by conflicting considerations. Defense counsel must investigate all apparently *substantial* defenses and must assert them in a proper and timely manner. If the action or inaction taken by an attorney that appears to be erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective.

Item 10(a) of the original Motion to Vacate charges that John Farese failed to timely file a motion to suppress evidence on the grounds of a violation of the Fourth Amendment to the Constitution. (The Amended Motion reflects that the affidavit for the search warrant was overbroad and was otherwise unreasonable.) Although other grounds are conclusively stated, the significant ground for this Motion is based upon the single premise: John Farese did not timely file a third motion to suppress based upon the overbreath of the affidavit and warrant, thereby resulting in the defendant being deprived of an appellate review on this issue and a fair trial.

First, it must be noted that it is the law of this case that the third Motion to Suppress, which was not timely filed, was also denied on the merits by this Court and this Court was not reversed on that ruling.

When this motion was raised as grounds for reversal in the appeal of the criminal case, the Court of Appeals held that the third Motion to Suppress was not timely filed and therefore not a ground for reversal. This Court is confident that the Court of Appeals would not affirm a conviction upon the ground of untimeliness in the court below, if it would automatically entitle

the defendant to a new trial. Therefore, under ground 10(a) the prisoner to be is conclusively shown not to be entitled to relief.

Ground 10(b) asserts that John Farese "failed to diligently and reasonably conduct an investigation of the allegations of the indictment."

At the outset it must be noted that this is a very conclusory allegation with very subjective overtones.

In paragraph 16 of the Motion to Vacate, it is alleged that Mr. Farese did not follow a course which the defendant, a medical doctor, suggested in the matter of conducting a thorough investigation of the 300-count criminal case, whereas the Court of appeals has held in *Beasley, supra,* that the test is whether John Farese performed at least as well as a lawyer with ordinary training and skill in the criminal law as a lawyer, not as a medical doctor.

Ground 10(c) asserts that John Farese was paid exorbitant sums of money for attorney's fees and was motivated more by a personal pecuniary goal than the best interest of the defendant. Presumably in support of this allegation, the defendant has included paragraph 17, which states that the defendant has paid as attorney's fees "about $375,000 exclusive of expenses and costs of appeal."[2]

While it is true that this Court should not allow a person to have the ineffective assistance of counsel in his handling of the case, this Court should not permit a Section 2255 motion to be a ground for re-litigating an appeal of the criminal case. See *Beasley, supra.*

This case was tried fairly and the amount of money that the attorneys for the defendant charged was never a factor with the

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[2] This Court wonders what the attorneys fees and costs of the appeal and the protracted discovery and prosecution of this motion will and would be.

jury. If John Farese was motivated to overcharge his client, who deliberately hired him, this Court cannot intercede in a Section 2255 motion. The criteria for overturning a conviction on a Section 2255 motion for ineffective assistance of counsel is whether the attorney effectively represented his client, not whether he overcharged him.

In the Amended Motion to Vacate, the defendant asserts what appears to be a new ground for vacating the sentence. Present counsel assert that John Farese induced him to waive venue from Arkansas to Tennessee. This pertains only to the first 137 counts of the 300-count indictment.

In the first place, the defendant is now claiming that he did not know what he was doing. Elsewhere in the Motion, the defendant asserts that he was knowledgeable enough to tell his attorney how to investigate the case and when to file a motion to suppress and upon which grounds.

The record in this case reflects that the case was originally assigned to Judge Bailey Brown, at that time a district judge. It was assigned to the undersigned many months and many motions after Judge Brown had received it originally. After the case was assigned to this Court, an extended continuance was granted in order for John Farese to prepare for trial. The Court also granted extraordinary discovery to the defendant so that counsel could interview the potential witnesses and prepare for trial.

We know that defense counsel contacted many of the persons alleged by the government to have received more medical services than were actually rendered and that the defendant himself attended those investigative conferences between the attorney and the prospective government witness.

Paragraphs 13 and 14 of the Motion to Vacate contain allegations that pertain to this Court's actions and remarks to Attorney Farese, during the criminal trial, which were critical of Attorney Farese's conduct of the trial. This is the same meterial

which post-conviction counsel urged upon the Court of Appeals as grounds for a new trial based upon judicial misconduct. The remarks of the Court to attorneys Farese and Friedman were admonitions to the defense attorneys to prevent those attorneys from violating the procedures necessary for conducting a fair trial. The defense attornes pursued a deliberate pattern of delaying the trial and of trying to obtain an advantage for the defendant by unfair tactics. In its opinion affirming the conviction, the Court of Appeals did state that some of this Court's "comments and castigations of counsel would have been better left unsaid." However, the Court of Appeals also noted that "defense counsel repeatedly sought to elicit irrelevant testimony, or that they frequently disregarded earlier court rulings."

This Court concludes that from his three attorneys, to whom he paid, according to him, approximately $375,000 in fees and expenses, Dr. Winston Hall Worthington received the effective assistance of counsel. The Court also concludes that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" pursuant to 28 U.S.C. §2255.

It is therefore Ordered that the Motion to Vacate Sentence as Amended is hereby dismissed with prejudice.

The dismissal will, of course, render moot the prayer of the defendant to be permitted to remain free on his present bond pending disposition of his Motion to Vacate. Therefore, the Court is not required to rule upon the question of whether defendant is a prisoner in custody as required by Section 2255, *supra,* as a prerequisite for filing a motion to vacate a sentence. This Court has entered an Order on Motion to Reduce the defendant's sentence wherein he was directed to report to commence his period of incarceration on March 30, 1983.

ENTER: This 11th day of March, 1983.

/s/ ROBERT M. McRAE, JR.
United States District Judge

APPENDIX E

No. 83-5239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Winston Hall Worthington,
Petitioner-Appellant,

v.

United States of America,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed January 18, 1984

Before: ENGEL and CONTIE, Circuit Judges; and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge, delivered the opinion of the Court, in which ENGEL, Circuit Judge, joined. CONTIE, Circuit Judge (pp. 9-18) filed a separate concurring opinion.

WEICK, Senior Circuit Judge. Winston Hall Worthington, M.D., Petitioner-Appellant, has appealed to this Court from the judgment of the Federal District Court denying, without a hearing, his motion and amended motion to vacate sentence, filed pursuant to 28 U.S.C. § 2255.

On November 17, 1978, in a 300 count indictment returned in the United States District Court for the Western District of Ten-

nessee, Western Division, Worthington had been charged with ten violations of four different criminal statutes based upon his filing false claims under the Medicare and Medicaid statutes and regulations for medical services never rendered by him. The pertinent facts were partially stipulated by the parties in a trial by jury which lasted nearly two months. The jury found him guilty on 82 counts and not guilty on 116 counts. The court dismissed one (RICO) count and the government dismissed 101 counts. He was sentenced to two (2) years imprisonment and fined $40,000. Later the District Court reduced the fine to $20,000.

The offenses had been committed partially in the Eastern District of Arkansas and in the Western District of Tennessee, but the defendant, with the advice of his counsel, executed a written waiver of venue form agreeing that the trial be held in the Western District of Tennessee. The case had been originally assigned to District Judge Bailey Brown, but was later transferred for trial to District Judge Robert M. McRae, Jr. A jury was selected on April 7, 1980, but because two jurors were unable to attend, a mistrial was declared. The second trial commenced before a jury on April 9, 1980. Between December 1, 1978, and April 7, 1980, defendant had filed some 20 different motions and 10 pretrial hearings were conducted.

Defendant, with new counsel, appealed to this Court from the judgment of conviction alleging seven grounds of error, none of which involved his present claim of incompetence of his trial counsel. We affirmed the judgment of conviction. *United States v. Worthington,* 698 F.2d 820 (6th Cir. 1983). The judgment of conviction became final as appellant did not petition the Supreme Court for a writ of certiorari.

II.

The district judge in his Ruling On Motion To Vacate Sentence Pursuant To 28 U.S.C. § 2255 gave careful consideration to the contentions of petitioner. The Court stated:

The Motion was addressed to a single ground, the denial of the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of America. The reasons stated in numbered paragraph 10 of the Motion are as follows:

(a) Trial counsel, John Farese, failed to timely file a motion to suppress evidence, specifically attacking the search warrant and its supporting affidavit as being in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States, thereby denying defendant appellate review of the merits of the search and seizure, the product of which substantially supported the government's case. The Court of Appeals held that counsel had failed to comply with Rule 12(b) (3) and 12(f) of the Federal Rules of Criminal Procedure and thus, the motion to suppress was waived.

(b) Trial counsel, John Farese, failed to diligently and reasonably conduct an investigation of the allegations of the indictment, having had nearly three years to do so.

(c) Trial counsel, John Farese, was paid exorbitant sums of money for attorney's fees, expenses and management of litigation and was motivated more by personal pecuniary goal than the best interests of defendant.

. . .

On March 8, 1983, counsel for the defendant filed an Amended Petition for Relief Pursuant to 28 USC §2255. The Amended Motion asserts two numbered grounds. The first is limited to an elaboration of the Motion to Suppress issues asserted in the original Motion to Vacate and the Court of Appeals. The second ground of the Amended Motion is based upon an allegation that the defendant was induced by John Farese to waive venue for those offenses of the indictment alleged to have occurred in Arkansas.

Defendant charges that "Farese" did not advise him that he was executing such a waiver, the alternatives or the consequences.

28 U.S.C. § 2255 provides in part as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court with imposed the sentence tc vacate, set aside or correct the sentence.
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> * * * * * *
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> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

This Court concludes that the "motion and the files and records of the case conclusively show that the [about to be] prisoner is entitled to no relief." The reasons for this conclusion are set forth below.

The leading case in this circuit and the one relied upon by the movant/defendant is *Beasley v. United States,* 491 F.2d 687 (C.A. 6 1974). That case notes that the clause of the Sixth Amendment to the Constitution which guarantees "assistance of counsel for his defence" means effective assistance of counsel. This means counsel who is reasonably likely to render and does render reasonably effective assistance. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest undeflected by conflicting considerations. Defense

counsel must investigate all apparently *substantial* defenses and must assert them in a proper and timely manner. If the action or inaction taken by an attorney that appears to be erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective.

Item 10(a) of the original Motion to Vacate charges that John Farese failed to timely file a motion to suppress evidence on the grounds of a violation of the Fourth Amendment to the Constitution. (The Amended Motion reflects that that affidavit for the search warrant was overbroad and was otherwise unreasonable.) Although other grounds are conclusively stated, the significant ground for this Motion is based upon the single premise: John Farese did not timely file a third motion to suppress based upon the overbreadth of the affidavit and warrant, thereby resulting in the defendant being deprived of an appellate review on this issue and a fair trial.

First, it must be noted that it is the law of this case that the third Motion to Suppress, which was not timely filed, was also denied on the merits by this Court and this Court was not reversed on that ruling.

When this motion was raised as grounds for reversal in the appeal of the criminal case, the Court of Appeals held that the third Motion to Suppress was not timely filed and therefore not a ground for reversal. This Court is confident that the Court of Appeals would not affirm a conviction upon the ground of untimeliness in the court below, if it would automatically entitle the defendant to a new trial. Therefore, under ground 10(a) the prisoner to be is conclusively shown not to be entitled to relief.

In our opinion, in the direct appeal, we dealt with this subject under the reading of "The Motion To Suppress." Actually,

defendant did not file just one Motion to Suppress, but filed three Motions to Suppress. We stated:

> The district court overruled the April 7 Motion to Suppress on grounds of timeliness and on the merits. On April 8 a mistrial ws declared for other reasons. A new trial commenced on April 9. Not until the 20th day of the new trial, namely, on May 19, 1980 did defendant "renew" his motion to suppress. The renewed motion alleged for the first time that the evidence should be suppressed because the scope of the search warrant was too broad. The district court concluded that the May 19 motion to suppress was not a renewal of the earlier motion, but rather was a new motion alleging a new reason why the evidence should be suppressed. The court overruled the new motion stating that ". . . it was not filed in accordance with the rules; it is not the renewal of another motion, it's a new motion, and it is called a renewal to try to get around the rule."

Fed. R. Crim. P. 12 provides:

> (b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> . . .
>
> (3) Motions to suppress evidence;
>
> . . .
>
> (f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defense or objections or to make requests which must be made prior to trial, . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.
>
> . . .

> Appellant further argues that since the district court ruled on the merits of his third motion to suppress, the issue was preserved for appeal. Under the facts of this case, we disagree. The district court overruled the midtrial motion to suppress on both timeliness grounds and on the merits. That it chose to rule on the merits at all does not alter the fact that the motion to suppress was made in violation of Fed. R. Crim. P. 12(b)(3), nor does it alter the fact that defendant waived the objection under Criminal Rule 12(f). *United States v. Baker,* 638 F.2d 198, 202 (10th Cir. 1980); *United States v. Sisca,* 503 F.2d 1337, 1349 (2d Cir. 1974), *cert. denied,* 419 U.S. 1008 (1974).

698 F.2d at 823-24.

Actually, it is now the contention of appellant that the search warrant was overbroad; that it included matters relating to his private practice, for which he was not indicted. We hold that there was probable cause to support the issuing of the search warrant. The affidavit supporting the warrant contained averments by five former employees that fraudulent Medicare and Medicaid practices were regularly pursued during their terms of employment, and covered appellant's medical records for the period authorized by the warrant. *Cf. United States v. Abrams,* 615 F.2d 541, 545 (1st Cir. 1980) (similar employee averment sufficient to authorize seizure of all records of Medicare and Medicaid services billed and purportedly performed during period of employment). The matters relating to his private practice were not offered in evidence at the trial. We, therefore, separate the private practice part in the warrant from the portion offered at the trial, and hold that the defendant was not prejudiced by the contested warrant. *Accord VonderAhe v. Howland,* 508 F.2d 364, 372 (9th Cir. 1975).

In his reply brief, appellant states: "The petitioner has alleged that he repeatedly asked counsel to file a motion to suppress attacking the warrant and affidavit. He was advised that 'the time was not yet right.' " (Page 5). Thus it appears that

counsel's timing for filing a motion to suppress was trial strategy and its employment in good faith by counsel violates no duty owing to his client.

In a trial which was the longest ever to take place in the district, where 115 witnesses testified, 75 for the government and 40 for the defendant, and the defendant's counsel was able to obtain acquittal on 116 counts of the indictment, dismissal by the government of 101 counts, dismissal of the RICO count by the court and conviction on only 82 counts, the defendant ought not to be heard to say that he had ineffective assistance of counsel. The District Court was in the best position to determine whether defendant's counsel was incompetent and it ruled that petitioner "received the effective assistance of counsel." (Record, p. 044).

The District Court in its opinion stated:

> In the Amended Motion to Vacate, the defendant asserts what appears to be a new ground for vacating the sentence. Present counsel assert that John Farese induced him to waive venue from Arkansas to Tennessee. This pertains only to the first 137 counts of the 300-count indictment.
>
> In the first place, the defendant is now claiming that the did not know what he was doing. Elsewhere in the Motion, the defendant asserts that he was knowledgeable enough to tell his attorney how to investigate the case and when to file a motion to suppress and upon which grounds.

Other assignments of error not treated herein have no merit.

We find no merit in this appeal. *Fornash v. Marshall,* 686 F.2d 1179 (6th Cir. 1982).

The judgment of the District Court is affirmed.

CONTIE, Circuit Judge, concurring. Although I agree with the conclusion reached by the majority, I am of the opinion that more extensive analysis of the search warrant issues is necessary

in order to decide the petitioner's ineffective assistance of counsel claim. Accordingly, I state my views separately.

Worthington's primary contention is that trial counsel incompetently failed to file a timely motion to suppress medical records. This evidence was an important part of the government's case. The Eighth Circuit has held that where a suppression motion would be successful, an attorney is guilty of ineffective assistance if he does not file the motion on time. *Brown,* 656 F.2d at 363.[1] Conversely, if such a motion would fail, counsel may not be criticized for having accurately assessed his client's chances of successfully challenging the warrant. *United States v. Yelardy,* 567 F.2d 863, 865 n.1 (6th Cir.), *cert. denied,* 439 U.S. 842 (1978). *See also Fornash v. Marshall,* 686 F.2d 1179, 1190 (6th Cir. 1982), *cert. denied,* 103 S. Ct. 1439 (1983); *Sallie v. State of North Carolina,* 587 F.2d 636, 641 (4th Cir. 1978), *cert. denied,* 441 U.S. 911 (1979); *cf. United States v. Zazzara,* 626 F.2d 135, 138 (9th Cir. 1980) (counsel was not ineffective in failing to file an unmeritorious motion to suppress an indictment). Thus, whether trial counsel in the present case acted incompetently in not filing a timely motion to suppress depends upon the merits of the search and seizure question.[2] I emphasize that I reach the search and seizure issue only to discuss whether Worthington's sixth amendment right to effective assistance of counsel was violated. This court rejected the petitioner's fourth amendment claim in its prior opinion.

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[1] In *Brown,* there apparently were no strategic reasons for not filing the suppression motion.

[2] I would not follow the Ninth Circuit's approach which excuses a failure to file a motion to suppress where the motion may have been meritorious but where the question was close. *Satchell v. Cardwell,* 653 F.2d 408, 410 (9th Cir. 1981), *cert. denied,* 454 U.S. 1154 (1982). If the fourth amendment issue is close and the evidence is relatively important, the defense is "substantial" and a "lawyer with ordinary training and skill in the criminal law," *Beasley v. United States,* 491 F.2d 687, 696 (6th Cir. 1974), normally would assert it. Absent overriding strategic considerations, counsel is ineffective, regardless of the closeness of the fourth amendment issue, if he does not file a suppression motion which would have been successful.

Worthington contends that the search warrant in this case was insufficiently particular, was overbroad and was based upon an affidavit which relied upon confidential informants who were not shown to be credible or reliable.

The objection to the affidavit will be considered first. The most recent Supreme Court case dealing with the subject of confidential informants is *Illinois v. Gates,* ____ U.S. ____, 103 S. Ct. 2317 (1983), which abandoned the course originally charted in *Aguilar v. Texas,* 378 U.S. 108 (1964) and in *Spinelli v. United States,* 393 U.S. 410 (1969). The lower courts had construed the latter two decisions to require both that confidential informants demonstrate a "basis of knowledge" for their statements and that these informants be shown to possess "veracity" or "reliability." *Gates,* 103 S. Ct. at 2327. The *Gates* Court, while acknowledging that the concepts of "basis of knowledge," "veracity" and "reliability" remain important, nevertheless held that these elements are not separate and independent requirements which must be satisfied in every case. *Id.* at 2327-28. The Court fashioned a new standard for determining whether information obtained from confidential informants establishes probable cause:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial bases for . . . conclud[ing]" that probable cause existed.

Id. at 2332.

In the present case, the confidential informants were six of Worthington's former employees. Five of these employees had personal knowledge that the petitioner regularly defrauded the Medicare and Medicaid programs during their periods of

employment. Consequently, the basis of knowledge of these employees was exceptionally good. The search warrant covered these respective employment periods. Although the affidavit contained little information concerning the veracity or reliability of these employees, the very existence of numerous informants, all of whom supplied information concerning fraudulent Medicare and Medicaid practices, bolstered the credibility of each. Moreover, the credibility of "confidential source #3" was supported by the findings of a named Blue Cross/Blue Shield auditor. Finally, I am of the opinion that any lack of information concerning the credibility and reliability of these informants was adequately compensated for by the excellent basis of knowledge possessed by each employee. *Gates,* 103 S. Ct. at 2329.

I would hold, therefore, that the magistrate had a substantial basis for concluding, under the totality of the circumstances, that all of the petitioner's Medicare and Medicaid records constituted evidence of crime. It is well established that if an affidavit contains employee averments that fraudulent Medicare and Medicaid practices were regularly pursued during a particular time period or periods, all Medicare and Medicaid records for those periods may be seized. *See United States v. Abrams,* 615 F.2d 541, 545 (1st Cir. 1980); *cf. Andresen v. Maryland,* 427 U.S. 463, 480-81 n.10 (1976) and *United States v. Wuagneux,* 683 F.2d 1343, 1349 (11th Cir. 1982) (where probable cause indicates the existence of a complex fraudulent scheme, the search warrant may authorize the government to seize enough evidence to obtain a complete picture of the defendant's scheme).[3]

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[3] The petitioner also contends that the affidavit for search warrant did not establish that his medical recores would be found at 1029 Whitney Avenue, Memphis, Tennessee. This point was raised on direct appeal but was not mentioned in either the original or amended motion to vacate sentence. Accordingly, this additional argument will not be considered.

The petitioner's second argument is that since the search warrant did not describe the things to be seized with sufficient particularity, it was a prohibited general warrant. The search warrant ordered any United States postal inspector to seize the following items:

> All patient treatment records and charge slips; all patient ledger cards; the general ledger(s) containing record of payments made to employees, laboratories, etc.; all x-ray films; and other fruits, instrumentalities and evidence of crime at this time unknown, covering the period from July 1973 to the present. . . .

Although I agree with the petitioner (for reasons to be discussed shortly) that this language was overbroad, I do not agree that this warrant was a general warrant. A general warrant permits general exploratory rummaging through a person's belongings. *See, e.g., Andresen,* 427 U.S. at 480; *United States v. Christine,* 687 F.2d 749, 752 (3d Cir. 1982). Such a warrant violates the particularity requirement in two respects: It permits the seizure of items where the warrant actually describes others and it gives law enforcement officials discretion to determine what objects will be seized and what objects will not. *See, e.g., Andresen,* 427 U.S. at 480; *Marron v. United States,* 275 U.S. 192, 196 (1927); *Christine,* 687 F.2d at 752; *United States v. Cardwell,* 680 F.2d 75, 77 (9th Cir. 1982).

Although the search warrant under review was quite broad in scope, it was not a general warrant because it gave the postal inspectors no discretion to determine what items would be seized. The warrant in effect ordered the inspectors to seize *all* of Worthington's medical records; they were not given authority to pick and choose. Moreover, since the warrant mandated the seized records which were not described by the warrant. Under these circumstances, the issue is whether such expansive language was supported by probable cause and not whether the magistrate approved a general warrant. *See United States v.*

Riggs, 690 F.2d 298, 299 (1st Cir. 1982); *Christine,* 687 F.2d at 753; *United States v. Brien,* 617 F.2d 299, 306 (1st Cir.), *cert. denied,* 446 U.S. 919 (1980); *In Re Lafayette Academy, Inc.,* 610 F.2d 1, 5-6 (1st Cir. 1979).[4]

The cases cited by the petitioner on this point either support the government's position or are distinguishable. In the latter category is *Cardwell, supra,* which involved a search warrant containing no time limitation and not revealing the particular crime for which evidence was being sought. The present warrant contains a time limitation. Worthington has not argued the latter point. In *Abrams, supra,* the search warrant authorized the seizure of "certain" records which were evidence of fraudulent Medicare and Medicaid practices. Since the officials executing the warrant were given no guidance about what constituted fraudulent records, they had unfettered discretion to decide which items to seize. No such determinations were required of the postal inspectors in the current case. Both *Montilla Records of Puerto Rico, Inc. v. Morales,* 575 F.2d 324 (1st Cir. 1978) and *United States v. Drebin,* 557 F.2d 1316 (9th Cir. 1977), *cert. denied,* 436 U.S. 904 (1978), involved sizures of materials reproduced in violation of the copyright laws. In both cases, law enforcement officials received inadequate guidance concerning how it identify illegally reproduced materials. The officials therefore had discretion to seize some materials and not others. In contrast, the postal inspectors in the present case clearly were instructed to seize all medical records.[5]

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[4] The phrase, "and other fruits, instrumentalities and evidence of crime at this time unknown," does not render the warrant insufficiently particular. *See Andresen,* 427 U.S. at 479-82.

[5] *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979) and *Stanford v. Texas,* 379 U.S. 476 (1965), both involved first amendment considerations not present here. The *Stanford* case distinguished books used for record-keeping purposes from books containing ideas protected by the first amendment. 379 U.S. at 485 n.16.

Although the search warrant under consideration was not a general warrant, it nevertheless was overbroad. The warrant authorized the postal inspectors to seize, and they did seize, practically all of the petitioner's medical records. The supporting affidavit, however, established probable cause to seize only Worthington's Medicare and Medicaid records.[6] Though the non-Medicare and non-Medicaid records were not admitted into evidence at trial, the issue remains whether the seizure of the Medicare and Medicaid records, which was supported by probable cause, is severable from the other seizures for which probable cause was lacking.

This circuit has been joined by several others in approving the concept of severance. *United States v. Thompson,* 612 F.2d 233, 234 (6th cir. 1979); *Riggs,* 690 F.2d at 300; *Christine,* 687 F.2d at 754-59; *Cardwell,* 680 F.2d at 78; *United States v. Cook,* 657 F.2d 730, 735 (5th Cir. 1981); *Vonder Ahe v. Howland,* 508 F.2d 364, 372 (9th Cir. 1974). A dispute exists, however, concerning the mechanics of how the severance doctrine is to be applied.[7] The majority of courts examine the warrant's language. Those clauses and phrases that are supported by probable cause are severed from those that are not. Evidence seized under valid language is admitted while evidence seized under invalid portions of the warrant is suppressed. *Riggs,* 690 F.2d at 300; *Christine,* 687 F.2d at 754-59; *Cook,* 657 F.2d at 734-36. In contrast, one circuit directly evaluates whether there was probable cause to seize the particular evidence that the defendant

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[6] The government conceded on direct appeal (appellee's brief at 51, n.44) that there was not probable cause to seize more than the Medicare and Medicaid records. It has not attempted to retract this concession on collateral review.

[7] Our decision in *Thompson* is not helpful on the question of mechanics. It should be noted that although the panel in *Thompson* reversed itself on rehearing, it did so on grounds other than the propriety of severance.

wishes to suppress. *VonderAhe,* 508 F.2d at 372.[8]. This distinction is crucial in the present case because all of the search warrant language is overbroad. The weight of current authority would require the Medicare and Medicaid records to be suppressed; for although the government had probable cause to seize those records, they were seized under invalid warrant language. The *VonderAhe* decision would, of course, permit the records to be admitted. The conflict between approaches to applying the severance doctrine is not addressed by the majority opinion, which cites only *VonderAhe. I believe that the parties are entitled to an explanation of why the VonderAhe* approach is the proper one.[9]

The Third Circuit in *Christine* identified five purposes traditionally held to be served by the warrant requirement. First, the requirement forces the government to show probable cause to search before it invades a citizen's privacy. Second, the warrant procedure interposes a neutral and objective judicial officer between citizens and law enforcement officials involved in the often competitive enterprise of ferreting out crime. Third, the terms of a warrant limit the scope of the search. Fourth, a war-

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[8] Although certain language in the Ninth Circuit's *Cardwell* case is more akin to the majority approach than to the *VonderAhe* approach, 680 F.2d at 78-79, *Cardwell* nevertheless cited *Vonder Ahe* in approving fashion. *Id.* The Third Circuit in *Christine* expressly rejected the *VonderAhe* approach, 687 F.2d at 759, but acknowledged that *VonderAhe* remains viable. *Id.* at 755. Consequently, I conclude that *VonderAhe* retains precedential value.

[9] I am cognizant of the general rule that overbroad search warrant language may be cured if the affidavit establishing probable cause is attached to the warrant and if the warrant incorporates the affidavit by suitable reference. *See, e.g., Cook,* 657 F.2d at 735-36; *Lafayette Academy,* 610 F.2d at 4 (and cases cited therein). Although the search warrant under review refers to the affidavit, the record does not disclose whether the affidavit was affixed to the warrant when the search occurred. On this state of the record, therefore, the government may not avail itself of this rule.

rant notifies the subject of the search of the government official's authority to search and the extent of that authority. Finally, the warrant procedure generates a record susceptible to review. 687 F.2d at 756-57. The court concluded that its approach to severance served all of these purposes. *Id.* at 758.

It should initially be noted that the Third Circuit did not state that the *VonderAhe* decision failed to serve the first, second, third and fifth pruposes listed above. As noted in the discussion of *Illinois v. Gates, supra,* the affidavit clearly established probable cause to seize the Medicare and Medicaid records. *Compare Christine,* 678 F.2d at 758. The affidavit was reviewed by a neutral and objective magistrate who issued the warrant. Moreover, even though the language of the warrant was broader than the underlying showing of probable cause, the warrant was particular. Hence, its terms limited the scope of the search to the objects or items described. *Id.* Furthermore, the severance process does not affect the availability of a record for appellate review. *Id.*

In criticizing *VonderAhe,* the Third Circuit stated that the Ninth Circuit's approach permits *de novo* appellate review of the government's arguments for a search and seizure rather than only limited review of the magistrate's assessment of probable cause. This conclusion is erroneous, as is demonstrated by the fact that the previous discussion of probable cause reviewed the magistrate's finding under the standard set forth in *Illinois v. Gates.*

Second, the Third Circuit held that the *VonderAhe* approach to severance violates the Warrant Clause's notification principle:

> [I]n failing to demand that the warrant be valid in significant measure ..., the *VonderAhe* approach offends the notification principle of the warrant clause by not ensuring that the subject of the search receives notice of the officer's lawful authority to search. Under *VonderAhe,* the war-

> rant served upon a person could be completely invalid and yet evidence seized in the search may be admitted on the basis of an affidavit that the person never saw until after the search had been completed.

Christine, 687 F.2d at 759.

The Third Circuit neglected to mention, however, that its application of the severance doctrine also violates the notification principle. In *Christine,* the search warrant contained both valid and invalid clauses. This was not known at the time of the search, however, because that determination occurred only later. Consequently, the warrant as it stood at the time of execution notified the subject of the search that government officials possessed authority to conduct a search of much greater magnitude than was in fact permissible. The same occurred, of course, in the present case.

I am of the opinion that severing searches that are based upon probable cause from those not so grounded will violate the notification principle regardless of which approach to severance is adopted. The real issue is whether evidence seized pursuant to probable cause may be admitted under that circumstance. This circuit, and every other circuit that has considered the severance question, has held that severance is permissible. I would adhere to those decisions. In reaching that conclusion, however, it is irrelevant whether the entire warrant is overbroad, although partially based upoon probable cause, or whether the warrant is divisible into various clauses and phrases, some of which are grounded upon probable cause and some of which are not. The essence of the severance doctrine is that evidence seized pursuant to probable cause should be admissible even if the language of the search warrant is not fully supported by probable cause. Unlike the *Christine* decision and other cases like it, the *VonderAhe* approach assures that such evidence will be admissible. Accordingly, I would adopt the *VonderAhe* method of applying the severance doctrine and would hold that

the petitioner's Medicare and Medicaid records were properly admitted into evidence. Since a timely suppression motion would have been unmeritorious, Worthington's trial counsel was not guilty of ineffective assistance in failing to file one.

For these reasons, I concur in the majority's decision to affirm the judgment of the district court.

APPENDIX F

No. 83-5239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Winston Hall Worthington, M.D.
Petitioner-Appellant

v.

United States of America
Respondent-Appellee

ORDER

(Filed March 5, 1984)

Before: ENGEL and CONTIE, Circuit Judges and WEICK, Senior Circuit Judge.

A majority of the court did not favor rehearing of the petition for rehearing en banc and said petition for rehearing was referred to this panel for decision.

Upon consideration, it is ORDERED that said petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk